KENT

LAND USE HEARING EXAMINER

Lee Raaen Hearing Examiner

CITY OF KENT

| In the Matter of the Application of |) | No. | CE-2013-2 KIVA#RPP3-2134240 |
|---|---|-------|--------------------------------|
| Brandon Olsen, on behalf of AT&T Mobility |) | Russe | ell Road Park WTF |
| For Approval of a Conditional Use Permit |) | | INGS, CONCLUSIONS, DECISION |

SUMMARY OF DECISION

The request for a conditional use permit to replace an existing light pole and construct a 110-foot tall light pole with a wireless telecommunication facility on top, and a 290 square foot equipment shelter near the base on property addressed as 5821 West James Street, is APPROVED. Conditions are necessary to mitigate specific impacts of the proposed development.

SUMMARY OF RECORD

Hearing Date:

The Hearing Examiner held an open record hearing on the request on March 19, 2014. The hearing record was held open until March 21, the end of the Mitigated Determination of Nonsignificance appeal deadline.

Testimony:

The following individual presented testimony under oath at the open record hearing:

Erin George, City Senior Planner

Exhibits:

- 1. Staff Report, dated March 12, 2014
- 2. Distribution of Agenda and Staff Report, dated March 12, 2014
- 3. Notice of Public Hearing with: Affidavit of posting, publishing, and mailing, dated March 7, 2014; Declaration of Service, dated March 7, 2014; distribution list, 300' radius list, and Notice of Public Hearing ad with confirmation from *Kent Reporter*, with receipt of publication, dated March 4, 2014
- 4. Mitigated Determination of Nonsignificance, with Certificate of Posting, dated February 21, 2014

- 5. MDNS-Public Notice publication ad and *Kent Reporter* email verification receipt, dated February 21, 2014
- 6. MDNS-Distribution, with Declaration of Delivery, dated February 21, 2014
- 7. Notice of Application and Affidavit of Posting, dated January 24, 2014, with Distribution Sheet and verification of email distribution Screenshot
- 8. Notice of Application publication ad, dated January 24, 2014, and *Kent Reporter* email verification receipt, dated January 21, 2014
- 9. Environmental Checklist, dated November 27, 2013, plus three pages of view photos looking north, south, and southwest, dated November 5, 2013
- 10. Environmental Review Report Decision Document, dated February 14, 2014
- 11. Routing Slip routing Conditional Use Permit application to City agencies, dated December 4, 2013
- 12. WTF Conditional Use Permit Application, received November 27, 2013
- 13. Site Plan Maps, revised November 26, 2013:
 - a. Title Sheet (Sheet T-1)
 - b. Civil Survey (Sheet C-1)
 - c. Site Plan (Sheet A-1)
 - d. Enlarged Site Plan (Sheet A-2)
 - e. Elevation (Sheet A-3)
- 14. Aerial site photo, dated March 19, 2014
- 15. Email from Matthew Knox to Erin George, dated March 13, 2014
- 16. Email from George Johnston, to Erin George, dated March 18, 2014

The Hearing Examiner enters the following Findings and Conclusions based upon the testimony and exhibits admitted at the open record hearing:

FINDINGS

- 1. Brandon Olsen, on behalf of AT&T Mobility (Applicant), requests a Conditional Use Permit (CUP) to replace an existing 91-foot tall light pole with a 110-foot tall light pole. A wireless telecommunication facility would be constructed on top, and a 290-square foot equipment shelter near the base. The property is located at 5821 West James Street. Exhibit 1, Staff Report, pages 1 and 2; Exhibit 12; Exhibit 13.
- 2. The City of Kent (City) determined the application was complete on November 27, 2013. The City posted Notice of the Application and Environmental Checklist on the subject property and published notice in the Kent Reporter on January 24, 2014. On March 7, 2014, the City mailed

¹ The Applicant did not appear at the hearing. The Hearing Examiner delayed the start of the hearing in order to allow the City to contact the Applicant. The Applicant was unable to attend due to a scheduling mix-up at the Applicant's office.

 $^{^2}$ The subject property is identified by the King County Assessor as Parcel No. 2322049027. The legal description of the subject property is included on the Title Sheet and Civil Survey. *Exhibit 13.a and d.*

notice of the open record hearing to owners of property within 300 feet of the subject property; emailed notice to the Applicant, property owner, and agencies; and published notice in the Kent Reporter.³ Exhibit 1, Staff Report, page 5; Exhibit 3; Exhibit 7; Exhibit 8.

State Environmental Policy Act

The City acted as lead agency and analyzed the environmental impact of the 3. proposed use, as required by the State Environmental Policy Act (SEPA), chapter 43.21C Revised Code of Washington (RCW). The City reviewed the Applicant's SEPA Checklist and other available information and determined that the proposal would not have a probable significant adverse impact on the environment. The Applicant's Environmental Checklist identified songbirds as having been observed or known to be on or near the site. City issued a Mitigated Determination of Nonsignificance (MDNS), with three conditions, on February 21, 2014. The conditions concern soil sampling for metals. The City posted the MDNS on site, published notice in the Kent Reporter, and emailed or mailed to application agencies, the Applicant and owner on February 21, 2014. City Senior Planner Erin George testified that the MDNS appeal deadline was March 21, 2014. The Hearing Examiner held the record open until March 21, 2014, the MDNS appeal deadline. The MDNS was not appealed. Exhibit 1, Staff Report, page 3; Exhibit 4; Exhibit 5; Exhibit 6; Exhibit 9; Exhibit 10. Testimony of Ms. George.

Comprehensive Plan, Zoning, and Surrounding Property

- The property is designated Parks and Open Space (POS) under the City 4. Comprehensive Plan (Comprehensive Plan). The Parks and Open Space designation represents publicly owned land that is either large active park, or undeveloped, or developed for passive recreation open space land that may have environmental sensitivities. City Comprehensive Plan (Revised May 4, 2006), page 4-57. The City staff identified the following Comprehensive Goals and Polices as relevant to the proposed use: Goal UT-7: Promote the expansion of telecommunication services to all locations within Kent's Provide access by future development to a variety of Planning Area. UT-7.3: telecommunications Policy In recognition choices; encouragement of the expansion of cellular communications, work with utility providers to find desirable locations for future facilities; Goal UT-8: Review the location of new telecommunication facilities to ensure that proposed locations promote the efficient distribution of services and minimize impacts on adjacent land uses and the environment. Exhibit 1, Staff Report, page 5.
- 5. The property is zoned Residential Agricultural (SR-1). The purpose of the SR-1 zone is to provide for areas allowing low density single-family

³ The City staff report states that pproperty owners within 300 feet were notified of the application and public hearing on March 9, 2014. *Exhibit 1, Staff Report, page 5.*

residential development. SR-1 zoning shall apply to those areas identified in the Comprehensive Plan for low density development, because of environmental constraints or the lack of urban services. *Kent City Code* (*KCC*) 15.03.010. WTFs not exceeding 120 feet are allowed on property owned, leased, or otherwise controlled by the City with a CUP. *KCC* 15.08.035.I.1.b. Exhibit 1. Staff Report, page 3.

6. Properties to the northeast and west (Riverbend golf course) are zoned SR-1. Properties to the north contain the City Public Works operations facility and Kent Valley Ice Arena, and are zoned Low Density Multifamily Residential (MR-G). A mobile home park is located to the south and zoned Mobile Home Park (MHP), and to the east is an apartment complex zoned Medium Density Multifamily Residential (MR-M). Exhibit 1, Staff Report, page 3; Exhibit 13.c.

Existing Property and Proposed Use

- The proposed WTF would be located within the Russell Road Sports Complex. 7. which is owned and operated by the City of Kent Parks Department. This sports complex contains several baseball fields, with associated parking, bleachers, restrooms and concession buildings within a 36-acre parcel. The City of Kent Public Works operation facility is in the northern portion of this parcel, occupying approximately one-fourth of the parcel's acreage. Russell Road South, which provides access to the sports complex, is located along the property's west side and West James Street is along the property's north side. The Applicant would lease 540 square feet.4 No additional parking would be required. The Applicant proposes to replace an existing 91-foot tall light pole in the southwest corner of the property with a 110-foot tall Twelve one-foot by eight-foot directional panel replacement light pole. antennas would be placed on top of the light pole. A 290-square foot equipment shelter would be constructed near the base of the pole to house radio transmitters, receivers, and other WTF equipment. Electricity would run the equipment cabinets, and the facility would be remotely monitored for fire, smoke intrusion, and AC power failure. The closest residence is approximately 115 feet to the south. The Applicant estimates that one maintenance staff vehicle trip visit a month would be needed. Exhibit 1, Staff Report, page 2, 7, 9 and 10; Exhibit 9; Exhibit 13.b.
- 8. City staff identified the site as within the Tacoma smelter plume, with potential arsenic contamination greater than 100 parts per million. MDNS conditions require that the Applicant contact the Department of Ecology to determine if soil sampling is necessary. City staff also prepared an Environmental Review Report, dated February 14, 2014. No sensitive areas are on or near the site. The Green River is located approximately 1,200 feet to the northwest, across Russell Road, from the location of the proposed pole

⁴ The City Staff Report identified a lease area of 450 square feet. *Exhibit 1, Staff Report, page 7.* The Title Sheet identified a lease area of 540 square feet. *Exhibit 13.a.*

location. The proposed use would add 290 square feet of impervious surface to the site. Stormwater would be infiltrated on-site. *Exhibit 4; Exhibit 10.*

- 9. The Applicant's project description attached to the CUP application determined no existing WTF was located within the geographic area that meets the Applicant's engineering requirement. The Applicant identified a need for the proposed WTF to fill a gap in coverage from north to South 228th Street to Kent Des Moines Road to Hwy 516 and east to Washington Avenue North, and would provide in-building coverage to homes, buildings, commercial/retail areas, and roads in this area. The Applicant's facility would comply with all Federal Communications Commission requirements. City staff determined, after discussion with the Applicant, that there are no alternative sites that could provide the proposed coverage. *Exhibit 1, Staff Report, pages 11 and 12; Exhibit 12.*
- 10. Matthew Knox, City Environmental Ecologist, provided an email comment, dated March 13, 2014, noting that the proposed tower location is approximately 1,500 feet from an existing bald eagle nest. He requested that the Applicant either attached a nesting platform above the antenna array or design the tower to discourage osprey or eagle use. The Applicant provided an email response, dated March 18, 2014, explaining raptors may build nests where there is a "top-hat" design or maintenance design. The Applicant proposes a more close-mounted antenna design without a "top-hat," making the tower undesirable for nesting. Exhibit 15; Exhibit 16.

Landscaping

11. Several tall trees in the vicinity of the proposed WTF would partially block views of the WTF. A wooden light pole would replace the existing wooden light pole. The WTF antennas would be mounted close to the light fixture, and the antennas would be painted to match the color of the light pole. The Applicant provided view photos looking south, southwest, and north at the proposed WTF. The proposed equipment shelter would be designed to resemble other ball field buildings. City code provides that WTFs shall be enclosed, where appropriate, by security fencing not less than six (6) feet in height; provided however, that the planning manager or, where applicable, the hearing examiner may waive these requirements, as appropriate. KCC 15.08.035.F.6. The City staff recommended that a chain-link fence be installed for security purposes. Exhibit 1, page 9; Exhibit 9; Exhibit 10; Exhibit 13.a. and c.

⁵ The Applicant did not provide an inventory for the record of its existing WTF sites that are either within the jurisdiction of the city or within one (1) mile of its borders. *KCC 15.08.035.G.4.*

Staff Recommendation

12. City staff reviewed the application and determined that the proposed use would meet the code criteria, including the policies and goals of KCC 15.08.035.A for WTFs. *Exhibit 1, Staff Report, pages 6-12.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has jurisdiction to hear and decide this application pursuant to the authority granted by the legislature to the City in chapter 35A.63 of the Revised Code of Washington (RCW) and the authority granted by the City of Kent in chapter 2.32 of the Kent City Code (KCC).

Criteria for Review

KCC 15.09.030.D sets forth seven specific criteria and one optional criterion that must be satisfied for approval of a Conditional Use Permit (CUP). Each of the seven criteria must be satisfied in order to grant approval. In order to approve a request for a CUP, the Hearing Examiner must conclude that:

- 1. The proposed use in the proposed location will not be detrimental to other uses legally existing or permitted outright in the zoning district;
- 2. The size of the site is adequate for the proposed use;
- 3. The traffic generated by the proposed use will not unduly burden the traffic circulation system in the vicinity;
- 4. The other performance characteristics of the proposed use are compatible with those of other uses in the neighborhood or vicinity;
- 5. Adequate buffering devices such as fencing, landscaping, or topographic characteristics protect adjacent properties from adverse effects of the proposed use, including adverse visual or auditory effects;
- 6. The other uses in the vicinity of the proposed site are such as to permit the proposed use to function effectively;
- 7. The proposed use complies with the performance standards, parking requirements, and other applicable provisions of this title; and
- 8. Any other similar considerations may be applied that may be appropriate to a particular case.

KCC 15.09.030.D.

In addition to the general CUP requirements, the Hearing Examiner must take into account specific considerations of KCC 15.08.035.I.2 for granting a conditional use for this WTF:

- a. Height of the tower
- b. Proximity to residential structures and residential district boundaries
- c. Nature of uses on adjacent and nearby properties
- d. Surrounding topography
- e. Surrounding tree coverage and foliage

- f. Design of the tower with particular reference to design characteristics that have the effect of reducing or eliminating visual obtrusiveness
- g. Availability of suitable existing towers, other structures, or alternative technologies not requiring the use of towers or structures
- h. Obstruction of or interference with views
- i. Consistency with purpose and goals set forth in subsection (a) of Section 15.08.035

KCC 15.08.035.I.2.

The criteria for review adopted by the Kent City Council are designed to implement the requirement of chapter 36.70B RCW to enact the Growth Management Act. RCW 36.70B.040 mandates that local jurisdictions review proposed development to ensure consistency with City development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. RCW 36.70B.040.

Federal Telecommunications Act of 1996

In addition to considering the criteria and guidance in the City Code, the Hearing Examiner must be cognizant of federal statues and court decisions that impact what authority a local government has over the siting of wireless communication facilities.

Federal law places certain limitations upon the power of local government to control the siting of personal wireless service facilities ("wireless facilities"). 47 U.S.C. 332(c)(7)(A). Chief amongst those limitations is the preemption of control over radio frequency emissions. 47 U.S.C. 332(c)(7)(B)(iv). As long as the wireless facility emits radio energy within the Federal Communications Commission's guidelines, local jurisdictions are forbidden from considering the environmental effects of such emissions in decisions about placement, construction, or modification of wireless facilities.

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services

[...]

^{6 (7)} Preservation of local zoning authority

Conclusions Based on Findings

- 1. With conditions, the proposed use would not be detrimental to other uses legally existing or permitted outright in the zoning district. Residential uses are located to the south and east of the property. After construction, the proposed use would not interfere with the use of the sports complex. The existing sports complex contains baseball fields with existing light poles. The Applicant provided view simulations of the proposed WTF. The replacement of an existing light pole with a WTF nineteen feet higher would not be detrimental to surrounding properties. No additional parking is required and stormwater runoff would be infiltrated on site. Conditions are necessary to ensure that the WTF antennas would be painted to match the color of the replacement light pole, that the equipment cabinet is constructed of materials similar to other structures on site, and that there be no lighting of the equipment cabinet or pole, other than the replacement light fixture. Findings 1, 5 12.
- 2. The size of the site is adequate for the proposed use. The parcel that makes up the site is approximately 36 acres in size. The proposed use would replace an existing light pole with a WTF, including a 290-square foot equipment shed. Findings 1, 7 12.
- 3. The traffic generated by the proposed use would not unduly burden the traffic circulation system in the vicinity. One vehicle trip a month for maintenance would have a negligible impact on traffic. Findings 1 and 7.
- 4. With conditions, the other performance characteristics of the proposed use are compatible with those of other uses in the neighborhood or vicinity. The proposed use would replace an existing light pole with a light pole and WTF 19 feet higher. Conditions are necessary to ensure compliance with City performance standards, zoning code, and other city regulations and to ensure that the characteristics of the use are compatible with neighboring uses. Findings 1, 7-12.
- 5. With conditions, buffering devices such as fencing, landscaping, or topographic characteristics would protect adjacent properties from adverse effects of the proposed use. City staff in its report and at the hearing proposed a chain link fence around the equipment shed as required by KCC 15.08.035.F.6. However, it is also required that WTF structures be designed to blend into the existing constructed environment. KCC 15.08.035.F. 9. The inclusion of a chain link fence may be inconsistent with the design and appearance of surrounding park improvements, and may increase the visual impacts of the facility. KCC 15.08.035.F.6 allows the planning manager to waive the fence requirement as appropriate, and it may be appropriate to do so here. Therefore, a security fence will not be required as a condition of the Conditional Use Permit if waived by the planning manager. The proposed use would replace an existing wooden light pole

with a wooden light pole and WTF 19 feet higher. Conditions are necessary to ensure that the WTF antennas would be painted to match the color of the replacement light pole, that the equipment cabinet is constructed of materials similar to other structures on site, and that there be no lighting of the equipment cabinet or pole, other than the replacement light fixture. Findings 1, 7 - 12.

- 6. The other uses in the vicinity of the proposed site are such as to permit the proposed use to function effectively. No surrounding uses would interfere with the proposed use. *Findings 1, 7 12.*
- 7. With conditions, the proposed use complies with the performance standards, parking requirements, and other applicable provisions of KCC Title 15. Adequate parking for maintenance of the proposed use is located on the property. Conditions are necessary to ensure compliance with City performance standards, zoning code, and other city regulations, including MDNS mitigation conditions regarding soil sampling. Findings 1, 5 12.
- 8. No other considerations are appropriate in this particular case. The proposed use would generate no negative visual or auditory effects. The use would not generate glare, smoke, dust, or odors; use hazardous substances; or generate hazardous waste. The City analyzed the environmental impact of the proposed use and determined that it would not have a probable significant adverse environmental impact. The City's determination was not appealed. The City provided adequate notice and opportunity to comment on the application. Findings 1 12.
- 9. As set out in the above findings, with conditions, the proposed project would be consistent with the City's WTF development standards in KCC 15.08.035. The proposed use would increase the light pole height by 19 feet, approximately 115 feet north of the closest residence within a sports complex with appropriate topography. Existing trees would partially block views of the WTF and a minimal alteration of views from surrounding properties would occur. A wooden pole would be installed and WTF antennas painted to match the light pole. No alternatives are available and the proposed use is consistent with the purpose and goals of KCC 15.08.035.A. Conditions are necessary to ensure that the WTF antennas would be painted to match the color of the replacement light pole; that the equipment cabinet is constructed of materials similar to other structures on site; and that there be no lighting of the equipment cabinet or pole, other than the replacement light fixture. Findings 1 3, 5 12.

DECISION

Based on the preceding Findings and Conclusions, the request for a Conditional Use Permit to replace an existing light pole and construct a 110-foot tall light pole with

a wireless telecommunication facility on top, and a 290 square foot equipment shelter near the base on property addressed as 5821 West James Street is **APPROVED**, with the following conditions:⁷

- 1. The replacement pole shall be of the same material as the existing light pole. Antennas shall also be painted to match the pole.
- 2. The equipment cabinet shall be constructed of materials similar to other structures on site, substantially as shown on the plans dated November 27, 2013, in order to promote consistent site design.
- 3. The equipment cabinet shall be enclosed by a vinyl-coated chain link fence and screened with Type II landscaping at least 3 feet in width in order to screen the lease area from surrounding properties, unless waived by the Planning Director.
- 4. No lighting shall be used for either the equipment cabinet or the pole, with the exception of the replacement field light fixture and any safety lighting that may be required by the Federal Aviation Administration.
- 5. The proposal is subject to all mitigation measures found in the MDNS issued February 21, 2014, for ENV#2013-23, RPSW# 2134242.
- 6. This Conditional Use Permit shall become void if the proposed use is not constructed within three (3) years of the Notice of Hearing Examiner Decision date and resolution of any appeals.

DATED this 2nd day of April 2014.

LEE RAAEN

Hearing Examiner Sound Law Center

⁷ This decision includes conditions designed to mitigate impacts of this proposed project as well as conditions required by City code.